

SANTA CLARA COUNTY

Audit Report

OPEN MEETINGS ACT PROGRAM

Chapter 641, Statutes of 1986

July 1, 1998, through June 30, 2001



STEVE WESTLY
California State Controller

February 2004



STEVE WESTLY
California State Controller

February 26, 2004

Mr. John V. Guthrie
Director of Finance
Santa Clara County
70 West Hedding Street, 2nd Floor
San Jose, CA 95110

Dear Mr. Guthrie:

The State Controller's Office (SCO) has completed an audit of the claims filed by Santa Clara County for costs of the legislatively mandated Open Meetings Act Program (Chapter 641, Statutes of 1986) for the period of July 1, 1998, through June 30, 2001.

The county claimed \$4,861,115 (\$4,862,115 in costs less a \$1,000 penalty for filing late) for the mandated program. Our audit disclosed that \$207,198 is allowable and \$4,653,917 is unallowable. The unallowable costs occurred primarily because the county claimed costs that are outside the scope of the mandate. In addition, the county overstated direct and indirect costs claimed. The county was paid \$2,336,036. The amount paid in excess of allowable costs claimed, totaling \$2,128,838, should be returned to the State.

The SCO has established an informal audit review process to resolve a dispute of facts. The auditee should submit, in writing, a request for a review and all information pertinent to the disputed issues within 60 days after receiving the final report. The request and supporting documentation should be submitted to: Richard J. Chivaro, Chief Counsel, State Controller's Office, Post Office Box 942850, Sacramento, CA 94250-0001.

If you have any questions, please contact Jim L. Spano, Chief, Compliance Audits Bureau, at (916) 323-5849.

Sincerely,

Original Signed By:

VINCENT P. BROWN
Chief Operating Officer

cc: (See page 2)

VPB:ams/jj

cc: Dave Elledge
 Controller-Treasurer
 Santa Clara County
Calvin Smith, Program Budget Manager
 Corrections and General Government
 Department of Finance

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Audit Report

Summary

The State Controller's Office (SCO) has completed an audit of the claims filed by Santa Clara County for costs of the legislatively mandated Open Meetings Act Program (Chapter 641, Statutes of 1986) for the period of July 1, 1998, through June 30, 2001. The last day of fieldwork was October 6, 2003.

The county claimed \$4,861,115 (\$4,862,115 in costs less a \$1,000 penalty for filing late) for the mandated program. The audit disclosed that \$207,198 is allowable and \$4,653,917 is unallowable. The unallowable costs occurred primarily because the county claimed costs that are outside the scope of the mandate. In addition, the county overstated direct and indirect costs claimed. The county was paid \$2,336,036. The amount paid in excess of allowable costs claimed, totaling \$2,128,838, should be returned to the State.

Background

Chapter 641, Statutes of 1986, added Section 54954.2 to the *Government Code* to require that the legislative body of the local agency, or its designee, post an agenda containing a brief general description of each item of business to be transacted or discussed at the regular meeting, subject to exceptions stated therein, specifying the time and location of the regular meeting and requiring that the agenda be posted at least 72 hours before the meeting in a location freely accessible to the public.

Chapter 641, Statutes of 1986, added Section 54954.3 to the *Government Code* to provide an opportunity for members of the public to address the legislative body on specific agenda items or any item of interest that is within the subject matter jurisdiction of the legislative body. This section requires that this opportunity for comment be stated on the posted agenda.

Parameters and Guidelines, adopted by the Commission on State Mandates, establishes the state mandate and defines criteria for reimbursement. In compliance with *Government Code* Section 17558, the SCO issues claiming instructions for each mandate requiring state reimbursement to assist cities, counties, a city and county, and special districts in claiming reimbursable costs.

Objective, Scope, and Methodology

The audit objective was to determine whether costs claimed are increased costs incurred as a result of the legislatively mandated Open Meetings Act Program (Chapter 641, Statutes of 1986) for the period of July 1, 1998, through June 30, 2001.

The auditor performed the following procedures:

- Reviewed the costs claimed to determine if they were increased costs resulting from the mandated program;
- Traced the costs claimed to the supporting documentation to determine whether the costs were properly supported;
- Confirmed that the costs claimed were not funded by another source; and
- Reviewed the costs claimed to determine that the costs were not unreasonable and/or excessive.

The SCO conducted the audit in accordance with *Government Auditing Standards*, issued by the Comptroller General of the United States. The SCO did not audit the county's financial statements. The scope was limited to planning and performing audit procedures necessary to obtain reasonable assurance concerning the allowability of expenditures claimed for reimbursement. Accordingly, transactions were examined, on a test basis, to determine whether the amounts claimed for reimbursement were supported.

Review of the county's management controls was limited to gaining an understanding of the transaction flow and claim preparation process as necessary to develop appropriate auditing procedures.

Conclusion

The audit disclosed instances of noncompliance with the requirements outlined above. These instances are described in the accompanying Summary of Program Costs (Schedule 1) and in the Findings and Recommendations section of this report.

For fiscal year (FY) 1998-99, the county was paid \$549,914 by the State. The audit disclosed that none of the costs is allowable. The amount paid in excess of allowable costs claimed, totaling \$549,914, should be returned to the State.

For FY 1999-2000, the county was paid \$1,236,122 by the State. The audit disclosed that \$44,214 is allowable. The amount paid in excess of allowable costs claimed, totaling \$1,191,908, should be returned to the State.

For FY 2000-01, the county was paid \$550,000 by the State. The audit disclosed that \$162,984 is allowable. The amount paid in excess of allowable costs claimed, totaling \$387,016, should be returned to the State.

**Views of
Responsible
Official**

The SCO issued a draft audit report on August 29, 2003. David E. Kahn, Deputy County Counsel, responded by the attached letter dated January 10, 2004, disagreeing with the audit results. The county's response is included in this final audit report. The county's response includes a legal brief addressed to the Superior Court of California, County of Santa Clara. However, Mr. Kahn stated the legal brief has not been officially filed with the court.

Restricted Use

This report is solely for the information and use of Santa Clara County, the California Department of Finance, and the SCO; it is not intended to be and should not be used by anyone other than these specified parties. This restriction is not intended to limit distribution of this report, which is a matter of public record.

Original Signed By:

JEFFREY V. BROWNFIELD
Chief, Division of Audits

Schedule 1— Summary of Program Costs July 1, 1998, through June 30, 2001

<u>Cost Elements</u>	<u>Actual Costs Claimed</u>	<u>Allowable per Audit</u>	<u>Audit Adjustments</u>	<u>Reference ¹</u>
<u>July 1, 1998, through June 30, 1999</u>				
Salaries	\$ 73,246	\$ —	\$ (73,246)	Finding 1
Benefits	11,525	—	(11,525)	Finding 1
Services and supplies	<u>397,987</u>	<u>—</u>	<u>(397,987)</u>	Finding 1
Subtotals	482,758	—	(482,758)	
Indirect costs	<u>68,156</u>	<u>—</u>	<u>(68,156)</u>	Finding 1
Subtotals	550,914	—	(550,914)	
Less late filing penalty	<u>(1,000)</u>	<u>—</u>	<u>(1,000)</u>	
Total costs	<u>\$ 549,914</u>	<u>—</u>	<u>\$ (549,914)</u>	
Less amount paid by the State		<u>(549,914)</u>		
Allowable costs claimed in excess of (less than) amount paid		<u>\$ (549,914)</u>		
<u>July 1, 1999, through June 30, 2000</u>				
Salaries	\$ 92,408	\$ 20,523	\$ (71,885)	Finding 1
Benefits	12,717	6,939	(5,778)	Finding 1
Services and supplies	<u>1,050,681</u>	<u>—</u>	<u>(1,050,681)</u>	Finding 1
Subtotals	1,155,806	27,462	(1,128,344)	
Indirect costs	<u>80,316</u>	<u>16,752</u>	<u>(63,564)</u>	Findings 1, 3
Total costs	<u>\$ 1,236,122</u>	44,214	<u>\$(1,191,908)</u>	
Less amount paid by the State		<u>(1,236,122)</u>		
Allowable costs claimed in excess of (less than) amount paid		<u>\$(1,191,908)</u>		
<u>July 1, 2000, through June 30, 2001</u>				
Salaries	\$ 120,657	\$ 97,397	\$ (23,260)	Finding 2
Benefits	718	718	—	
Services and supplies	<u>2,951,918</u>	<u>63,083</u>	<u>(2,888,835)</u>	Finding 1
Subtotals	3,073,293	161,198	(2,912,095)	
Indirect costs	<u>1,786</u>	<u>1,786</u>	<u>—</u>	
Total costs	<u>\$ 3,075,079</u>	162,984	<u>\$(2,912,095)</u>	
Less amount paid by the State		<u>(550,000)</u>		
Allowable costs claimed in excess of (less than) amount paid		<u>\$ (387,016)</u>		

Schedule 1 (continued)

Cost Elements	Actual Costs Claimed	Allowable per Audit	Audit Adjustments	Reference ¹
<u>Summary: July 1, 1998, through June 30, 2001</u>				
Salaries	\$ 286,311	\$ 117,920	\$ (168,391)	Findings 1, 2
Benefits	24,960	7,657	(17,303)	Finding 1
Services and supplies	<u>4,400,586</u>	<u>63,083</u>	<u>(4,337,503)</u>	Finding 1
Subtotals	4,711,857	188,660	(4,523,197)	
Indirect costs	<u>150,258</u>	<u>18,538</u>	<u>(131,720)</u>	Findings 1, 3
Subtotals	4,862,115	207,198	(4,654,917)	
Less late filing penalty	<u>(1,000)</u>	<u>—</u>	<u>1,000</u>	
Total costs	<u><u>\$ 4,861,115</u></u>	207,198	<u><u>\$(4,653,917)</u></u>	
Less amount paid by the State		<u>(2,336,036)</u>		
Allowable costs claimed in excess of (less than) amount paid		<u><u>\$(2,128,838)</u></u>		

¹ See the Findings and Recommendations section.

Findings and Recommendations

FINDING 1— Unallowable agenda preparation project costs

The county claimed \$4,627,428 in unallowable costs for the period of July 1, 1998, through June 30, 2001, consisting of salaries, benefits, services and supplies, and related indirect costs. The county incurred these costs for a software agenda preparation project. However, the software agenda preparation project is outside the scope of the Open Meetings Act mandate program. The following costs are unallowable:

	Fiscal Years			Totals
	1998-99	1999-2000	2000-01	
Salaries	\$ 73,246	\$ 71,885	\$ —	\$ 145,131
Benefits	11,525	5,778	—	17,303
Services and supplies	397,987	1,050,681	2,888,835	4,337,503
Indirect costs	68,156	59,335	—	127,491
Totals	<u>\$ 550,914</u>	<u>\$ 1,187,679</u>	<u>\$ 2,888,835</u>	<u>\$ 4,627,428</u>

The above costs were incurred for the development of agenda preparation and tracking software that the county commonly refers to as “Keyboard.” Costs for Keyboard represent system development costs and are not limited to time involved in the actual preparation and posting of meeting agendas. Thus, Keyboard costs are outside the scope of the mandate because they do not represent increased costs that the county was required to incur.

Parameters and Guidelines, issued by the Commission on State Mandates for the Open Meetings Act program, as amended on November 30, 2000, defines the scope of the mandate. The mandate scope states that local agencies shall be reimbursed for the increased costs which they are required to incur to prepare and post a single agenda that briefly describes each business item to be discussed or transacted at any one regular meeting and cites the meeting time and location.

Recommendation

The county should ensure that all costs claimed under the Open Meetings Act program are within the scope of the program’s *Parameters and Guidelines*.

County’s Response

The county believes that *Parameters and Guidelines* authorizes the county to claim implementation costs associated with the mandate program, including fixed assets, software, and technical services. The county states that the development and implementation of agenda processing software reduces the cost of implementing the Open Meetings Act program by reducing the amount of staff time required to produce agendas. The county also believes that costs unique to a county are reimbursable if the costs are reasonable based on the county’s size.

SCO's Comment

The finding and recommendation remain unchanged. Costs related to the acquisition and development of Keyboard agenda preparation software are not costs the county was required to incur under the mandated Open Meetings Act Program.

Parameters and Guidelines states that the scope of the mandate is limited to “. . . the increased costs [the county is] required to incur to prepare and post, at a site accessible to the public and at least 72 hours before the meeting, a single agenda containing a brief general description of each item of business to be transacted or discussed at any one regular meeting, and citing the time and location of the regular meeting.”

Parameters and Guidelines contains no language to support reimbursement for the development of agenda preparation software. The development of software such as Keyboard is not required or necessary to comply with the mandated program. Rather, the cost of the software development is a voluntary expense opted for by the county.

Although each county may have specific needs or particular challenges in complying with the mandate, the requirements under the mandated program are the same for all. As a result, counties of similar size should have similar claimed costs. However, statewide claims submitted during the audit period show that Santa Clara County's claimed costs far exceed claimed costs for any other county; therefore, Santa Clara County's size does not justify its claimed costs.

**FINDING 2—
Overstated salaries,
benefits, and related
indirect costs**

In FY 2000-01, the county claimed \$23,260 in overstated salaries, benefits, and related indirect costs for preparing and posting meeting agendas. The unallowable costs resulted from an overstated number of agenda items claimed and an overstated blended productive hourly rate.

The county claimed Board of Supervisors' Open Meetings Act costs using the standard time reimbursement option allowed in the *Parameters and Guidelines*. Under the standard time reimbursement option, reimbursement is calculated by multiplying the number of allowable agenda items by 30 minutes for each item and then by a blended productive hourly rate of the involved employees.

For FY 2000-01, the county claimed 2,284 agenda items for Board of Supervisors meetings, using a blended productive hourly rate of \$103.24. Agendas for Board of Supervisors meetings supported only 2,240 agenda items. The unallowable agenda items resulted from duplicate, unsupported, or unreimbursable agenda items claimed.

In addition, the county incorrectly calculated a blended productive hourly rate of \$103.24. The audited blended productive hourly rate is \$84.50. The blended productive hourly rate was adjusted for the following reasons:

- The county used a countywide base of 1,571 annual productive hours to calculate costs claimed for the standard time reimbursement option. The countywide annual productive hours included unallowable deductions from productive time for training and authorized breaks. The SCO excluded these deductions and revised the annual productive time to 1,722 hours.
- The county overstated the average loaded productive hourly rate for the two groups of employees included in the blended productive hourly rate calculation. The loaded productive hourly rate includes employee salary, benefit, and indirect costs. The county reported average loaded productive hourly rates of \$89.92 and \$140.34 for the Department Persons and Agenda Review groups of employees, respectively. The county was unable to provide documentation supporting the average loaded productive hourly rates claimed. Based on payroll records for each of the individual employees included in these groups, the average loaded productive hourly rates were instead calculated to be \$73.76 and \$97.42, respectively.
- The indirect cost rate used to calculate loaded productive hourly rates for the Clerk to the Board positions was overstated. The county reported an indirect cost rate of 88.5%; the adjusted indirect cost rate is 68% (refer to Finding 3).

A summary of the audit adjustment for the Board of Supervisors Open Meetings Act costs under the standard time reimbursement option is as follows:

	Fiscal Year 2000-01		
	<u>Claimed</u>	<u>Allowed</u>	<u>Adjustment</u>
Agenda items	2,284	2,240	(44)
Hours per item	<u>0.5</u>	<u>0.5</u>	<u>0.5</u>
Agenda time	1,142	1,120	<u>(22)</u>
Blended productive hourly rate	<u>\$ 103.24</u>	<u>\$ 84.50</u>	
Totals	<u>\$ 117,900</u>	<u>\$ 94,640</u>	<u>\$ (23,260)</u>

Parameters and Guidelines, Section VI, states that reimbursement under the standard time reimbursement option will be calculated based on the number of allowable meeting agenda items. Section VII states that the number of meeting agenda items will be supported by copies of agendas.

In addition, *Parameters and Guidelines* requires that all costs claimed be traceable to source documents and/or worksheets that show evidence of and the validity of such costs. Entities electing reimbursement under the standard time reimbursement option must maintain documentation showing the calculation of the blended productive hourly rate.

Finally, *Parameters and Guidelines* states that compensation for indirect costs is eligible for reimbursement using the procedures provided in Office of Management and Budget (OMB) Circular A-87.

Recommendation

The county should ensure that productive hourly rates are calculated using a consistent annual productive hours base that is traceable to source documents. In addition, blended productive hourly rates should be traceable to source documents and/or worksheets that validate such rates. Finally, indirect cost rates claimed should comply with procedures provided in OMB Circular A-87.

County's Response

On October 6, 2003, the county provided additional evidence to support the 2,284 agenda items claimed. In addition, the county believes that the SCO's claiming instructions allow the county to use a countywide base for productive hours in computing productive hourly rates used to claim employee costs. The county did not respond to discrepancies noted in the average loaded productive hourly rates for the Department Persons and Agenda Review groups of employees.

SCO's Comment

Based on additional documentation submitted, the number of allowable agenda items was revised to 2,240 in the final audit report. The SCO also adjusted annual productive hours used in calculating the blended productive hourly rate from 1,800 hours to 1,722 hours. The remainder of the finding and recommendation is unchanged.

In calculating countywide productive hours, the county included unallowable deductions for training and authorized break time. The county deducted training time based on training hours required by employees' bargaining unit agreements and/or continuing education requirements for licensure/certification rather than actual training hours attended. In addition, the county deducted authorized break time rather than actual break time taken. The county did not adjust for training time and break time directly charged to program activities during the audit period; therefore, the county cannot exclude those hours from productive hours.

FINDING 3— Overstated indirect cost rates

The county overstated its indirect cost rates for the Clerk of the Board Department for FY 1999-2000 and FY 2000-01. For FY 1999-2000, the county claimed \$4,229 in overstated indirect costs. For FY 2000-01, the overstated indirect cost rate affected only the blended productive hourly rate calculated for the standard time reimbursement option (see Finding 2). For FY 2000-01, the county did not claim any costs for the Clerk of the Board Department using the actual time reimbursement option.

The county overstated its indirect cost rates because it did not properly report offsetting revenues. In addition, the county was not able to identify whether offsetting revenues were applicable to direct or indirect costs.

For both FY 1999-2000 and FY 2000-01, the county's revenue and expenditure ledger for Fund 106, Clerk of the Board Department, shows revenues under the following line items: duplicating fees, miscellaneous income, other charges, and expenditure reimbursements. The county's indirect cost rate proposals (ICRP) for both fiscal years identified Expenditure Reimbursements as a reduction to allowable departmental direct costs; however, the county was unable to provide documentation showing that this line item was properly allocable to departmental direct costs. Also, the county did not include the remaining three revenue line items in the ICRP for both fiscal years and was unable to show that the three remaining revenue line items were allocable to departmental direct costs. As a result, all revenue line items identified in the county's revenue and expenditure ledger were deducted from allowable departmental indirect costs shown in the ICRP for both fiscal years.

A summary of the audit adjustment to claimed indirect costs is as follows:

	Fiscal Years	
	1999-2000	2000-01
Claimed indirect cost rate	76.4%	88.5%
Allowable indirect cost rate	61.0%	68.0%
Variance	(15.4)%	(20.5)%
Allowable salary and benefit costs	\$ 27,462	\$ — ¹
Totals	\$ (4,229)	\$ —

¹ As described above, the county did not claim any costs for the Clerk of the Board Department using the actual time reimbursement option in FY 2000-01.

Parameters and Guidelines states that compensation for indirect costs is eligible for reimbursement using the procedures provided in OMB Circular A-87. OMB Circular A-87, Attachment A, states that allowable costs must be net of all applicable credits.

Recommendation

The county should ensure that allowable indirect costs included in ICRP proposals are net of all applicable credits. The county should maintain sufficient evidence to allocate applicable credits to related direct or indirect costs.

County's Response

The county did not provide any written response or additional documentation for this audit finding.

**Attachment—
County's Response to Draft Audit Report**

OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA
70 West Hedding Street
East Wing, 9th Floor
San Jose, California 95110-1770
(408) 299-5900
(408) 292-7240 (FAX)



Ann Miller Ravel
COUNTY COUNSEL

Debra L. Cauble
Laurie F. Faulkner
Susan G. Levenberg
ASSISTANT COUNTY COUNSEL

January 10, 2004

Jim L. Spano, Chief, Compliance Audits Bureau
State Controller's Office
P.O. Box 942850
Sacramento, CA 94250-5874

Re: Response To Draft Audit Report On Santa Clara County
Open Public Meetings Act Program

Dear Mr. Spano:

On July 3, 2002, the State Controller's Office notified the County of Santa Clara that it would be conducting a field audit of some of the County's SB90 claims, including a claim for mandated costs the County incurred from implementing the Open Meetings Act. The Controller and County conducted an entrance conference on August 5, 2002, and the audit commenced immediately. You issued a draft audit report on August 29, 2003. The County had an exit conference on October 6, 2003, on draft audit findings 2 and 3. The State Controller corrected the number of allowed agenda items in response to the exit conference, but not the calculations of the blended hourly rate.

On November 5, 2003, you and staff counsel, Carol Noreen, met with the County to discuss legal objections to finding 1 of the draft audit report, and took the County's comments under consideration. Staff counsel, Carol Noreen, notified the County in a letter dated December 23, 2003 (received December 29, 2003), that the State Controller was not modifying finding 1 in the draft audit report on the allowability of the County's SB90 Keyboard claim, and that the County's response to the draft audit report was due 15 days after receipt of her letter.

Accordingly, the County of Santa Clara submits its response (attached) to the Open Meetings Act draft audit report. The County requests that if the State Controller does not modify the draft

Letter to Jim L. Spano, Chief, Compliance Audits Bureau
Re: Response to Draft Audit Report on Santa Clara County
January 10, 2004
Page 2

audit report based on the comments in this response, that the response be included as an exhibit to the final audit report.

Thank you.

Very truly yours,

ANN MILLER RAVEL
County Counsel



DAVID E. KAHN
Deputy County Counsel

DEK/cmf

c: Phyllis Perez, Clerk of the Board
John Guthrie, Finance Director
Dave Elledge, Controller/Treasurer
Ann Ravel, County Counsel
Debra Cauble, Assistant County Counsel
Ram Venkatsan, SB 90 Coordinator
Carol Noreen, Staff Counsel, State Controller's Office
Rich Chivaro, Chief Counsel, State Controller's Office

ANN MILLER RAVEL, County Counsel (S.B. #62139)
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 San Jose, California 95110-1770
 Telephone: (408) 299-5900

Attorneys for COUNTY OF SANTA
 CLARA

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

In Re:)	No.
)	
STATE CONTROLLER'S OFFICE)	SANTA CLARA COUNTY'S RESPONSE
AUDIT REPORT ON SANTA)	TO DRAFT AUDIT REPORT
CLARA COUNTY OPEN)	
MEETINGS ACT PROGRAM)	
_____)	

INTRODUCTION AND PROCEDURAL HISTORY

The County of Santa Clara has a population of more than 1.7 million people and is the fifth largest county in California. In 2003, it prepared 34 meeting agendas for the Board of Supervisors with more than 2,000 separate agenda items. Over 30 departments at many different locations submit agenda items for the Board's consideration.

The Commission on State Mandates adopted test claims CSM-4257 and CSM-4469 to allow reimbursement for costs required to comply with the preparation and posting of both regular meeting and closed session agendas. The State Controller issued Parameters and Guidelines for Open Meetings Act SB90 reimbursement claims on September 22, 1988, amended on November 30, 2000. In compliance with the Parameters and Guidelines, the County of Santa Clara filed Open Meetings Act SB90 reimbursement claims for the period of July 1, 1998, through June 30, 2001, totaling \$4,861,115. These claimed costs included the County's Keyboard Software System (Keyboard), developed as a cost and time saving method for the implementation of the Open Meetings mandate.

On July 3, 2002, the State Controller's Office notified the County of Santa Clara that it would be conducting a field audit of the County's claim for mandated costs from implementing the Open Meetings Act. The Controller and County conducted an entrance conference on August 5, 2002, and the audit began. During the audit, Chief Deputy Controller Walter Barnes requested a legal opinion from State Controller staff counsel on the critical question for the audit; this question was:

Whether the development costs of the County's agenda production software system ("Keyboard") are allowable costs under the actual time method as defined by the Parameters and guidelines.

Staff counsel concluded, based on a flawed analysis, that the Keyboard costs were not allowed costs under the Parameters and Guidelines (Exhibit 1, Memorandum from Carol Noreen to Walter Barnes, dated November 18, 2002). The County wrote Chief Deputy Controller Barnes on June 16, 2003, requesting withdrawal and reconsideration of the November 18, 2002 opinion and explaining why (Exhibit 2, Letter from David Kahn to Walter Barnes, dated June 16, 2003). The State Controller's Office responded on July 16, 2003, and denied the County's request for a modification of the November 18, 2002 legal opinion to permit the claiming of Keyboard-related costs (Exhibit 3, Letter from Carol Noreen to David Kahn, dated July 16, 2003).

The State Controller's Office issued a draft audit report on August 29, 2003. The County had an exit conference on October 6, 2003, to respond to draft findings 2 and 3. On November 5, 2003, you and staff counsel Carol Noreen met with the County to discuss legal objections to the draft audit report finding 1, and took the County's comments under consideration. Staff counsel Carol Noreen notified the County in a letter dated December 23, 2003 (received December 29, 2003), that the State Controller was not modifying finding 1 in the draft audit report on the allowability of the County's SB90 Keyboard claim.¹ The State Controller previously agreed to modify the agenda item count in finding 2 as a result of the exit conference, but has not confirmed that it has accepted the County's blended productive hour calculations.²

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¹ The County's response is due 15 days after receipt of the December 23, 2003 letter, so is due January 13, 2004.

² The County has no comments on draft audit finding 3 other than what it provided at the exit conference.

The County strongly disputes draft audit finding 1, which incorrectly disallowed expenses for the Keyboard system required to comply with the State's open meetings mandate. Further, the County disputes draft audit finding 2, that the County overstated its blended productive hourly rate.

THE AUDIT FINDINGS ARE INCORRECT

Draft Audit Finding 1

Draft audit finding 1 is that "the county claimed \$4,627,428, in unallowable costs for the period of July 1, 1998 through June 30, 2001, consisting of salaries, benefits, services and supplies, and related indirect costs." The State Controller's basis for the draft finding is that the costs were incurred for a software agenda preparation project "outside the scope of the Open Meetings Act mandate program." And the audit found that Keyboard costs were outside the scope of the mandate because they were not costs that the county was required to incur.

The County requests that draft finding 1 be changed in the final audit report to allow the \$4,627,428 for Keyboard costs, for the reasons discussed in this response.

The Commission On State Mandates Has Approved Cost Recovery For Mandated County Open Meetings Costs.

The Commission on State Mandates adopted test claims CSM-4257 and CSM-4469, allowing reimbursement for certain costs required to comply with the preparation and posting of both regular meeting and closed session agendas. The Office of the State Controller issued Parameters and Guidelines for SB90 reimbursement claims under the Open Meetings Act on September 22, 1988, with subsequent amendments.

The Parameters and Guidelines Allow Recovery For Fixed Asset and Services Costs

State Mandated Costs Claiming Instructions No. 2000-15 (February 5, 2001) define reimbursable expenditures under "actual time":

Actual costs of administering the Open Meetings Act program in compliance with this mandate may be claimed. The following are reimbursable expenditures related to Open Meetings Act: Salaries, benefits, materials, supplies and fixed assets.

//

Moreover, the *Parameters and Guidelines* effective December 1, 2000, provide for reimbursement for services and fixed assets:

B. Services, Equipment and Supplies

Only expenditures which can be identified as a direct cost of the mandate can be claimed. List cost of materials or equipment acquired which have been consumed or expended specifically for the purposes of this mandate.

C. Fixed Assets

List the cost of fixed assets that have been acquired specifically for the purpose of this mandate. If a fixed asset is acquired for the open meeting act program but is utilized in some way not directly related to the program, only the pro-rata portion of the asset which is used for the purposes of the program is reimbursable.

The *Parameters and Guidelines* include services, supplies and fixed assets such as software development and acquisition as a reimbursable service or fixed asset when acquired for purposes of administering and complying with the Open Meeting Act mandate.

Indeed, the County of Santa Clara requested a 2003 amendment to the *Parameters and Guidelines* to expressly provide that fixed assets includes “all costs for upgrades of data processing equipment, software and technical services should be reimbursed.”³ The Commission on State Mandates staff response to the County’s requested amendment was:

The existing boilerplate language was adopted on January 24, 2002. At that time, **claimants proposed that language be included to allow reimbursement for data processing software and service costs to implement the mandated activities. The Commission found that these costs can be claimed in other cost elements, such as materials and supplies, contracted services, or under fixed assets. Therefore, the County of Santa Clara’s request to include reimbursement was previously addressed.**⁴ [Emphasis added.]

³ Final Staff Analysis for February 27 Hearing before Commission on State Mandates, page 35.

⁴ Id.

It follows that the draft audit report's finding 1, disallowing the Keyboard costs, contradicts the Commission on State Mandates staff analysis and conflicts with the *Parameters and Guidelines*. Draft audit finding 1 states that the scope of the mandate defined in the *Parameters and Guidelines* is limited to increased costs for preparing and posting a single agenda. But this narrow interpretation ignores the *Parameters and Guidelines* authorization to claim implementation costs for the mandate, including fixed assets, software and technical services. In fact, the development and implementation of agenda processing software reduces the cost of implementation of the Open Meeting state mandate by reducing the amount of staff time required to produce the agendas for the County of Santa Clara.

Reliance On *City of Merced v. State of California* Is Misplaced

The November 18, 2002 staff counsel memo that you rely on in disallowing Keyboard costs cites *City of Merced v. State of California* (1984) 153 Cal. App. 3d 777, for the proposition that where a county chooses to incur costs that result from a discretionary decision that is not a state mandate, the voluntary costs are not reimbursable. Reliance on the *City of Merced* case is misplaced. The issue in *City of Merced* was whether a city's decision to exercise its power of condemnation, thereby triggering mandated payment for business goodwill, was itself a state mandate. The Court found that "the fundamental concept is that the city or county is not required to exercise eminent domain." Consequently, the city's discretionary decision to condemn, even though triggering mandated payment for business goodwill, was optional and not eligible for reimbursement.

In sharp contrast to the discretionary decision to condemn in *City of Merced*, the County of Santa Clara does not have the option of whether or not it complies with the Open Meetings Act. As stated in the *Parameters and Guidelines* of February 5, 2001:

On October 22, 1987, the COSM determined that the Open Meetings Act program establishes costs mandated by the state according to the provisions listed in the attached P's and G's.
[Emphasis added.]

It follows that *City of Merced* in fact supports the County's claim for reimbursement. Because the Commission on State mandates has already found that costs for compliance with the Open Meetings Act are eligible for cost reimbursement, the correct analysis is not whether the Keyboard costs result from discretionary decisions by the County but whether they are within the scope of allowable reimbursable costs.

Staff counsel acknowledged on July 16, 2003, in response to the County's June 16, 2003 letter, that *City of Merced* "is not exactly on point." Nonetheless, the State Controller considered *City of Merced* instructive because it believed the County's decision to develop the Keyboard system was discretionary and the County could have used a "widely available word processing software, or some other method" to implement the Open Meetings mandate. It implied that if Keyboard was the only system available to implement the mandate, it would be allowable.

On November 5, 2003, the County met with State Controller audit staff to provide a detailed explanation of the process used in deciding to implement the Open Meetings mandate through the Keyboard system rather than an "off the shelf" software program. We explained that the County first looked for software and programs that could handle agenda preparation, and only after it determined that there was nothing commercially available did it purchase software and customize it to handle the agenda preparation functions. Bill Helfman, of the Clerk of the Board's office, explained that it was impractical to utilize conventional word processing software because of the size and complexity of the County's agendas. Allan Burdick explained that the Commission on State Mandates has historically considered the size of counties in determining that software could be reimbursable even if all counties were not required to buy it.

Unfortunately, the State Controller's December 23, 2003 response to this meeting failed to analyze Keyboard as a reasonable method to implement the mandated Open Meetings Act. Rather, the State Controller reiterated its erroneous conclusion that the only time reimbursable is that spent preparing and posting a final agenda.

Department of Finance v. Commission on State Mandates Supports the County's Claim

The California Supreme Court in *Department of Finance v. Commission on State Mandates*⁵ affirmed that the inquiry in determining whether a program requires reimbursement is whether the program is voluntary or mandatory. Of course, it is undisputed that County compliance with the Open Meetings Act is mandatory.

The State Controller's December 23, 2003 response admits that the SB 90 reimbursement requirement applies to the County's compliance with the Open Meetings Act. It then asserts that the County is claiming the case stands for the proposition that all costs associated with compliance are reimbursable. This mis-states the County's position,

⁵ 30 Cal. 4th 727 (2003)

which is that reasonable costs of compliance are reimbursable. The County demonstrated at the November 5 meeting with audit staff, that the Commission on State Mandates has allowed reimbursable costs unique to a County if those costs are reasonable based on the County's size.

For example, the Commission on State Mandates allowed computer costs unique to Los Angeles in implementing the Pacific Beach Safety (Water Quality Closure) mandate based on the large number of beaches which required tracking. Likewise, the Commission allowed computer programming costs for implementation of the Two-Way Traffic Signal Communication mandate, where the state's software was inadequate in Los Angeles's opinion for the size of the county. Finally, the Commission has allowed costs for necessary voting equipment to process absentee ballots in larger counties even though in theory the ballots could be hand-counted as they are in smaller counties. It follows that the State Controller's position disallowing Santa Clara County's Keyboard system for implementation of the Open Meetings Act mandate - that the County could have done it by hand - is without merit.

Draft Audit Finding 2

Draft audit finding 2 is that the County claimed \$106,415, in overstated salaries, benefits and related indirect costs for the preparation and posting of meeting agendas. In addition, it states that the County overstated the number of agenda items.

The State Controller Has Agreed To Revise The Number Of Agenda Items

The County presented evidence at the exit conference on October 6, 2003, that the State Controller erred in counting only 284 agenda items in the draft audit report and that the correct number of agenda items is 2,284. The State Controller has notified the County that it has revised its count of the agenda items upward to 2,241. Consequently, the final audit report will allow the revised number of agenda items, which is 2,241.

The County Correctly Calculated The Blended Productive Hourly Rate

Draft audit finding 2 states that the County used an inconsistent number of annual productive hours to calculate productive hourly rates. For costs claimed under the actual time reimbursement option, the County used a standard base of 1800 annual productive hours. However, in calculating costs claimed for the standard time reimbursement option (for FY 2000-01) the county instead used a countywide base of 1571 annual productive hours. The countywide annual productive hours base is not an accurate reflection of

annual productive hours for employees who worked on Open Meetings Act activities. We adjusted the annual productive hours base to the standard of 1800 hours.

We disagree with draft finding 2 to the extent that it disallows the County's calculated blended productive hourly rate. According to our study and examination of the State Controller claiming instructions, the time spent on training, authorized breaks, and staff meetings, all of which are paid but non-productive time, should be removed for the calculation of productive hours as explained to the State Controller audit staff in several meetings including the October 6 exit conference.

For the FY 2000-01 SB 90 claim, the Controller-Treasurer utilized the County-wide average annual productive hours per position as authorized in Section 7 of the State Controller's SB 90 Claiming Instructions for Cities, Counties and Special Districts. We believe that the use of a countywide productive hourly rate is explicitly authorized by the State Controller's SB 90 claiming instructions and that the productive hours used by the Probation Department in this claim are fully documented and were accurately calculated by the County Controller's Office. We furnished all supporting documents for the calculation of countywide productive hours to the state audit.

Further, as shown in the letter of December 27, 2001, from the County of Santa Clara Controller to the State Controller's Office, the State was notified two years ago that the County was electing to change its SB 90, claiming procedures relating to the calculation of productive hourly rates. The County reported that the switch to a countywide methodology for the calculation of average productive hours per position would improve SB 90 claiming accuracy, consistency, documentation and facilitate the State audit function. Consequently, more than 50 claims have been submitted and accepted during the past two years using the countywide methodology. During the audit of the Domestic Violence Treatment Services Program claim, State auditors objected to the deduction of break-time from the calculation of average productive hours per position, but were unable to provide any written state procedures, regulations or other legal authority to support their position, which also contradicts Section 7 of the State Controller's SB 90 Claiming Instructions for Cities, Counties and Special Districts.

CONCLUSION

The State Controller's Office erred in finding 1 of the draft audit report by disallowing \$4,627,428, in reimbursable costs for the County's mandated compliance with the Open Meetings Act. This error results from the State Controller's reliance on a mistaken November 18, 2002 legal opinion that the County's reasonable costs in implementing its Keyboard software to comply with the Open Meetings mandate is beyond the scope of the *Parameters and Guidelines*. The County has provided both written and oral information, and legal authority to the State Controller's Office, demonstrating that the Keyboard system qualifies as reasonable reimbursable costs for

implementation of the Open Meetings Act. Audit finding 1 conflicts with the Commission on State Mandates staff opinion that the *Parameters and Guidelines* provides for claiming implementation costs as materials and supplies, contracted services, or under fixed assets. Nevertheless, the State Controller has refused to modify finding 1 of the draft audit report to allow the County's reasonable mandated Open Meeting costs.

The County respectfully requests that finding 1 of the draft audit report be deleted and Santa Clara County's full Open Meetings Act implementation cost of \$4,861,115, be reimbursed as required by law under SB 90.

Further, the State Controller's Office erred in finding 2 of the draft audit report by disallowing \$106,415, in salaries and costs based on an inaccurate count of agenda items and improper adjustment of the blended hourly productive rate. The State Controller has already agreed that the number of agenda items will be revised upward from 284 to 2,241. The correct blended hourly rate is \$103.24. Accordingly, the allowed claim is \$115,680.42.

The County of Santa Clara respectfully requests that the State Auditor correct the draft audit report based on the factual and legal information provided in this response.

Dated: January 12, 2004

Respectfully submitted,

ANN MILLER RAVEL
County Counsel

By:



DAVID E. KAHN
Deputy County Counsel

Attorneys for COUNTY OF SANTA
CLARA

State of California

Kathleen Connell, State Controller

Memorandum

To : Walter Barnes
Chief Deputy Controller, Finance

Date: November 18, 2002

From : State Controller's Office
Carol L. Noreen
Staff Counsel

Subject: ALLOWABLE AGENDA COSTS-SANTA CLARA COUNTY OPEN MEETINGS ACT

Your request for a legal opinion was forwarded to me for a response.

ISSUES:

1. Whether the development costs of the county's agenda production software system ("Keyboard") are allowable costs under the actual time method as defined by the *Parameters and Guidelines*.
2. If the development costs of "Keyboard" are allowable as actual time, whether the posting of an agenda, as discussed in the *Parameters and Guidelines*, includes the administrative costs in developing and approving an agenda for presentation at a meeting.
3. Whether the Internet constitutes a location freely accessible to the public, as discussed in the *Parameters and Guidelines*.

CONCLUSIONS:

1. The development costs associated with the "Keyboard" system are not allowable costs under the actual time method as defined by the *Parameters and Guidelines*.
2. N/A.
3. The Internet constitutes a location freely accessible to the public as discussed in the *Parameters and Guidelines*.

BACKGROUND:

The Commission on State Mandates adopted the Open Meetings Act test claim (CSM-4257). Statutes of 1986, Chapter 641, added Government Code section 54954.2 to require that the legislative body of the local agency, or its designee, post an agenda containing a brief general description of each item of business to be

ALLOWABLE AGENDA COSTS/BROWN ACT REFORM-SANTA CLARA COUNTY

Walter Barnes

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November 18, 2002

transacted or discussed at the regular meeting and requiring that the agenda be posted at least 72 hours before the meeting in a location freely accessible to the public. Subsequent test claim legislation (CSM-4469) required the performance of additional activities in relation to the closed session requirements of the Brown Act.

The *Parameters and Guidelines* for Government Code Sections 54952, 54954.2, 54954.3, 54957.1, and 54957.7 provide for the following reimbursable activities:
Agenda Preparation and Posting Activities:

1. Prepare a single agenda for a regular meeting of a legislative body or local agency or school district containing a brief description of each item of business to be transacted or discussed at a regular meeting, including items to be discussed in closed session, and citing the time and location of the regular meeting. (Government Code Section 54954.2(a).)
2. Post a single agenda 72 hours before a meeting in a location freely accessible to the public. Further, every agenda must state that there is an opportunity for members of the public to comment on matters that are within the subject matter jurisdiction of the legislative body, subject to exceptions stated therein. (Gov. Code Sections 54954.2(a) and 54954.3(a).)

As of January 1, 1994, certain legislative bodies are eligible to claim reimbursement under these parameters and guidelines for the preparation of a brief general description of closed session agenda items, using either the actual or standard time reimbursement options.

The *Parameters and Guidelines* provide for the following under Actual Time:

List the meeting names and dates. Report each employee implementing the reimbursable activities by name, job classification and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

Title 2 CCR §1183.1(a)(4) provides that the *Parameters and Guidelines* shall contain a description of the specific costs and types of costs that are reimbursable, including one-time costs and on-going costs, and a description of the most reasonable methods of complying with the mandate.

Santa Clara County is claiming costs of actual time for the development of agenda preparation software, named "Keyboard" and a flat rate for the preparation and posting of the current year's agendas.

ALLOWABLE AGENDA COSTS/BROWN ACT REFORM-SANTA CLARA COUNTY

Walter Barnes

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Actual time costs claimed for development of the "Keyboard" software program are as follows: \$550,914 in FY 1998-90, \$1,187,679 FY 1999-2000 and \$2,888,835 in FY 2000-01, with costs expected to total approximately \$5.5 million.

ANALYSIS:

I. DEVELOPMENT OF AGENDA PRODUCTION SOFTWARE PROGRAM
"KEYBOARD"

The scope of the mandate is limited to the increased costs which a local agency is required to incur to prepare and post, at a site accessible to the public and at least 72 hours before the meeting, a single agenda containing a brief general description of each item of business to be transacted or discussed at any one regular meeting, and citing the time and location for the regular meeting.

No further provisions are contained within the *Parameters and Guidelines* as to what activities would be reimbursable under the mandate. Accordingly, it would appear that the preparation of a single agenda, containing a brief description of the agenda item, a task which could be completed by using any word processing program, or even a typewriter, was all that was intended.

There is no language in the *Parameters and Guidelines* that would support the reimbursement for the development of agenda preparation software, something independent of the time involved in preparing an agenda via a computer or typewriter. The development of such software as "Keyboard" is not required or necessary to comply with the mandate. Rather, the cost of the software development is a voluntary expense opted for by the county.

In a case where a county had chosen a certain direction that resulted in additional expenditures, which were not necessary to comply with a mandate, the voluntary costs were considered discretionary and not reimbursable. (*City of Merced v. State of California* (1984) 153 Cal. App. 3d 777).

From review of the Senate and Assembly Committee notes related to SB 36 and AB 1426¹, the Legislature estimated the statewide costs for the mandates associated with the Brown Act reform to be somewhere in the neighborhood of \$2-3.5 million annually. It is reasonable to assume that the costs of an agenda producing software program such as "Keyboard" were not intended by the Legislature when the preparation and posting of the agendas were required of local governing bodies given the limited estimated costs and the absence of any discussion by the Legislature of software programs or similar programs that would be necessary to comply with the mandate.

¹ Stats. 1993, c. 1137 (SB 36) and Stats. 1993, c. 1136 (AB 1426).

Walter Barnes

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November 18, 2002

II. THE INTERNET AS PUBLIC FORUM

Presently, there is no Supreme Court opinion expressly stating whether or not the Internet constitutes a public forum. However, case law exists expressing the view that the Internet provides many forums of discussion accessible to the public. In *ACLU v. Reno* 929 F. Supp. 824, 831 (E.D. Pa. 1996), the court estimated that approximately 40 million people presently use the Internet and that by the year 1999, the number of Internet users will have grown to approximately 200 million people. (*Cyber Promotions v. America Online, Inc.* (E.D. PA 1996) 948 F. Supp. 436; *Intel v Hamidi* 94 Cal. App. 4th (2001) unpublished; *ComputerXpress, Inc. V. Jackson* 93 Cal. App. 4th 993 (2001).)

In 78 Op. Atty Gen. Cal. 327 (1995), the Attorney General's Office determined that the posting of an agenda in a building closed after business hours did not satisfy the posting requirement of Government Code section 54954.2. The opinion goes on to conclude that to be consistent with legislative intent, "not only must the agenda be posted for at least the full 72 hours immediately preceding the meeting, it must be posted in a location that is freely accessible throughout that period. In short, the notice must be posted in a location where it can be read by the public at any time during the 72 hours immediately preceding the meeting."

Given the ability of the public to access the Internet at any time, from numerous locations through personal, school, work or government computers, it seems reasonable to assume that posting an agenda on the county's Internet website renders it accessible to the public and would be consistent with the intent of the Legislature.

This opinion is based upon the facts as represented in the request for a legal opinion. Should you have any questions regarding this opinion, please contact me at (916) 322-5369.

CLN/ac

cc: Jim Spano, Division of Audits

ALLOWABLE AGENDA COSTS/BROWN ACT REFORM-SANTA CLARA COUNTY

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Ann Miller Ravel
COUNTY COUNSEL

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Laurie F. Faulkner
Susan G. Levenberg
ASSISTANT COUNTY COUNSEL

June 16, 2003

Mr. Walter Barnes
Chief Deputy Controller, Finance
300 Capitol Mall, 6th Floor
Sacramento, CA 95814

Re: November 18, 2002, State Controller Memo On Allowable Agenda Costs;
Santa Clara County Open Meetings Act

Dear Mr. Barnes:

On July 3, 2002, the State Controller's Office notified the County of Santa Clara that it would be conducting a field audit of some of the County's SB90 claims, including a claim for mandated costs the County incurred from implementing the Open Meetings Act. The Controller and County conducted an entrance conference on August 5, 2002, and the audit commenced immediately. During the field audit, you requested a legal opinion on several audit-related issues, including:

1. Whether the development costs of the county's agenda production software system ("Keyboard") are allowable costs under the actual time method as defined by the *Parameters and Guidelines*.
2. If the development costs of "Keyboard" are allowable as actual time, whether the posting of an agenda, as discussed in the *Parameters and Guidelines*, includes the administrative costs in developing and approving an agenda for presentation at a meeting.¹

¹ A third issue was whether the Internet is a freely accessible location to the public, and State Controller Staff Counsel concluded that it is. The County agrees with this conclusion.

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Re: November 18, 2003, State Controller Memo

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State Controller's Staff Counsel Carol Noreen provided a legal opinion memorandum on these issues on November 18, 2002. She concluded that the development costs of the Keyboard system are not allowable costs under the actual time method, and consequently the second issue on administrative costs in approving an agenda for a public meeting was not applicable. The County of Santa Clara Controller's Office strongly disagrees with the legal conclusions reached in the November 18, 2003 memorandum. State Controller's audit staff has stated that it considers an opinion from the state controller legal office as binding on its field audit of allowable costs under the Open Meetings Act.

The County Controller asked our office to review the November 18 legal opinion. Upon review, it is apparent that the legal opinion is poorly researched, cites legal authority that is not applicable, and fails to consider relevant portions of the *Parameters and Guidelines*. It is my understanding that an exit interview and draft report may be scheduled in June or July, 2003. Accordingly, the County is requesting that you re-consider and revise the legal opinion in the November 18, 2003 memorandum from staff counsel Carol Noreen prior to completion of the field audit so that the auditors can properly consider allowable Open Meetings Act reimbursable costs.

1. **The Commission On State Mandates Has Approved Cost Recovery For Mandated County Open Meetings Costs.**

The November 18, 2003 memorandum correctly states that the Commission on State Mandates adopted test claims CSM-4257 and CSM-4469 to allow reimbursement for certain costs required to comply with the preparation and posting of both regular meeting and closed session agendas. The Office of the State Controller issued *Parameters and Guidelines* for SB90 reimbursement claims under the Open Meetings Act on December 20, 2001 and again on February 5, 2001.

2. **The Parameters and Guidelines Allow Recovery For Fixed Asset and Services Costs**

Controller staff counsel states that reimbursable costs include "increased costs which a local agency is required to incur to prepare and post...a single agenda." She then says that "no further provisions are contained within the *Parameters and Guidelines* as to what activities would be reimbursable under the mandate." This statement is obviously incorrect.

The February 5, 2001 *Parameters and Guidelines* define reimbursable expenditures under the "actual time" and states:

The following are reimbursable expenditures related to Open Meetings Act: Salaries, benefits, materials, supplies and fixed assets.

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Likewise, the *Parameters and Guidelines* of December 1, 2000, provide for reimbursement for services and fixed assets:

B. Services, Equipment and Supplies

Only expenditures which can be identified as a direct cost of the mandate can be claimed. List cost of materials or equipment acquired which have been consumed or expended specifically for the purposes of this mandate.

C. Fixed Assets

List the cost of fixed assets that have been acquired specifically for the purpose of this mandate. If a fixed asset is acquired for the open meeting act program but is utilized in some way not directly related to the program, only the pro-rata portion of the asset which is used for the purposes of the program is reimbursable.

In contrast to staff counsel's conclusion that there are "no further provisions" in the *Parameters and Guidelines* for reimbursable activities, the *Parameters and Guidelines* clearly include services, supplies and fixed assets such as software development and acquisition as a reimbursable service or fixed asset when acquired for purposes of complying with the Open Meeting Act mandate.

As a matter of fact, the County of Santa Clara requested a 2003 amendment to the *Parameters and Guidelines* to expressly provide that fixed assets includes "all costs for upgrades of data processing equipment, software and technical services should be reimbursed."² The Commission on State Mandates staff response to the County's requested amendment was:

The existing boilerplate language was adopted on January 24, 2002. At that time, **claimants proposed that language be included to allow reimbursement for data processing software and service costs to implement the mandated activities. The Commission found that these costs can be claimed in other cost elements, such as materials and supplies, contracted services, or under fixed assets. Therefore, the County of Santa Clara's request to include reimbursement was previously addressed.**³ [Emphasis added.]

² Final Staff Analysis for February 27 Hearing before Commission on State Mandates, page 35.

³ Id.

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It follows that staff counsel's conclusion that the only reimbursable activity is preparation of an agenda on a typewriter or existing word processing program contradicts the Commission on State Mandates staff analysis, is unsupportable and conflicts with the *Parameters and Guidelines*. Additionally, state controller staff counsel's suggestion that a typewriter can be used for preparation of the bi-weekly agenda for a County with a population of 1.7 million people, with Board agendas that often exceed 80 agenda items with associated attachments, is patently absurd. On the contrary, the development and implementation of agenda processing software reduces the cost of implementation of the Open Meeting state mandate by reducing the amount of staff time required to produce the lengthy agendas.

3. Reliance On *City of Merced v. State of California* Is Misplaced

The controller staff counsel cites *City of Merced v. State of California* (1984) 153 Cal. App. 3d 777 for the proposition that where a county chooses to incur costs that result from a discretionary decision that is not a state mandate, the voluntary costs are not reimbursable. Staff counsel's reliance on the *City of Merced* case is misplaced. The issue in *City of Merced* was whether a city's decision to exercise its power of condemnation, thereby triggering mandated payment for business goodwill, was itself a state mandate. The Court found that "the fundamental concept is that the city or county is not required to exercise eminent domain." Consequently, the city's discretionary decision to condemn, even though triggering mandated payment for business goodwill, was optional and not eligible for reimbursement.

In sharp contrast to the discretionary decision to condemn in *City of Merced*, the County of Santa Clara does not have the option of whether or not it complies with the Open Meetings Act. As stated in the *Parameters and Guidelines* of February 5, 2001:

On October 22, 1987, the COSM determined that the Open Meetings Act program establishes costs mandated by the state according to the provisions listed in the attached P's and G's. [Emphasis added.]

It follows that *City of Merced* in fact supports the County's claim for reimbursement and not the conclusion reached by staff counsel in her November 18 memorandum. Because the Commission on State mandates has already found that costs for compliance with the Open Meetings Act are eligible for cost reimbursement, the correct analysis is not whether the Keyboard costs result from discretionary decisions by the County but whether they are within the scope of allowable reimbursable costs. As discussed in Section 2, above, services and fixed assets used for complying with the mandate are

Letter to Mr. Walter Barnes

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reimbursable under the *Parameters and Guidelines*. State Controller staff counsel fails to mention anywhere in the November 18 memorandum that these types of costs are listed as reimbursable.

Moreover, the California Supreme Court issued its decision in *Department of Finance v. Commission on State Mandates; Kern High School District, Real Parties In Interest*, S109219, on May 22, 2003 and affirmed that *City of Merced* focuses on the underlying program to determine whether there is a state mandate. The Supreme Court held:

In *City of Merced*, the city was under no legal compulsion to resort to eminent domain- but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place.

Again in contrast, the County is required *in the first place* to comply with the Open Meetings Act. It follows that costs such as the County's Keyboard program, classified as services and fixed assets under the *Parameters and Guidelines*, are eligible for cost reimbursement.

4. Conclusion

The November 18, 2003, memorandum from the State Controller's Office that the field auditor is relying on is erroneous. Staff counsel has mis-read *City of Merced* and confuses the service and fixed asset decisions for carrying out a mandate with whether or not the underlying program is mandated. As previously determined by the Commission on State Mandates, the Open Meetings Act constitutes a state mandate which is eligible for reimbursement. The November 18 memorandum fails to address the eligibility of implementing services and fixed assets such as Keyboard for cost reimbursement.

Letter to Mr. Walter Barnes

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The County of Santa Clara requests that the State Controller's Office withdraw and reconsider its November 18, 2003 legal opinion in view of these comments. Furthermore, the County requests that the State Controller's Office issue an amended opinion that the County's Keyboard agenda production software costs are reimbursable under the Open Meetings Act state mandate.

Thank you.

Very truly yours,

ANN MILLER RAVEL
County Counsel



DAVID E. KAHN
Deputy County Counsel

DEK/cmf

c: Phyllis Perez, Clerk of the Board
John Guthrie, Finance Director
Dave Elledge, Controller/Treasurer
Ann Ravel, County Counsel
Debra Cauble, Assistant County Counsel
Ram Venkatsan, SB 90 Coordinator
Carol Noreen, Staff Counsel, State Controller's Office
Jim Spano, Division of Audits
Gary Larsen, Chief of Staff, State Controller's Office
Rich Chivaro, Chief Counsel, State Controller's Office



STEVE WESTLY
California State Controller

July 16, 2003

Via Facsimile (408) 292-7240 & U.S. Mail

David E. Kahn, Deputy County Counsel
Office of the County Counsel, County of Santa Clara
70 West Hedding Street
East Wing, 9th Floor
San Jose, CA 95110-1770

RE: *Allowable Agenda Costs; Santa Clara County- Open Meetings Act*

Dear Mr. Kahn:

In response to your letter of June 16, 2003, our office has reviewed the issues raised surrounding the November 18, 2002 memorandum on allowable agenda costs for Santa Clara County under the Open Meetings Act/Brown Act Reform.

After further review, it is still our position that the costs claimed by Santa Clara County for the development of the "keyboard" agenda preparation software, are not costs the County is required to incur under the mandate. While some computer software costs may be claimed under actual costs, as you note in your letter, the Commission on State Mandates did not suggest that all software costs were reimbursable.¹

It was my understanding when preparing my November 18, 2002 memorandum that the actual time costs claimed by Santa Clara were for the development and preparation of the "keyboard" software itself, or rather, system development costs, and not necessarily limited to the time involved in the actual preparation and posting of meeting agendas. Costs for the preparation and posting were also claimed under flat costs.

¹ Letter from Santa Clara County Counsel referencing Feb. 27 COSM comments to proposed 2003 amendments to Parameters and Guidelines.

David E. Kahn, Deputy County Counsel
July 16, 2003
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1. The Commission on State Mandates Has Approved Cost Recovery For Mandated County Open Meetings Costs

The Controller's Office does not dispute that certain costs involved with compliance under the Open Meetings Act/Brown Act Reform are reimbursable. However, reimbursable costs (in whatever form they are claimed) are limited to the costs outlined in the Parameters and Guidelines. As stated in my November 18, 2002 memorandum, the scope of the mandate is limited to the increased costs which a local agency is required to incur to prepare and post, at a site accessible to the public...a single agenda containing a brief general description of each item of business to be transacted..." This language is taken directly from the parameters and guidelines. What you fail to acknowledge is that any costs claimed under "actual time" are reimbursable only to the extent that the costs come within the scope of the mandate. The conclusion reached in my November 18, 2002 memorandum was that the costs associated with the development of the "keyboard" system were not within the scope of reimbursable activities, as the associated costs were not "required or necessary" but merely "a voluntary expense."

A. Scope of Mandate

Reimbursable costs allowed under the mandate are limited to those costs which are anticipated by the scope of the mandate itself. A county does have the discretion to incur thousands or millions of dollars in expenses for software development costs for an agenda preparation program. However, those costs are reimbursable only if they were required to be incurred by the county to comply with the scope of the mandate.

The Parameters and Guidelines state:

Local agencies shall be reimbursed for the increased costs, which they are required to incur to prepare and post, at a site accessible to the public and at least 72 hours before the meeting, a single agenda containing a brief general description.

For each eligible claimant ... the following cost items are reimbursable:

A. Agenda Preparation and Posting Activities:

1. increased costs to prepare a single agenda for a regular meeting of the legislative body of a local agency containing a "brief general description of each item of business to be transacted or discussed at a regular meeting and citing the time and location of the regular meeting; and

David E. Kahn, Deputy County Counsel
July 16, 2003
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2. costs to post a single agenda 72 hours before a meeting in a location freely accessible to the public. Further every agenda for a regular meeting must state that there is an opportunity for members of the public that are within the subject matter jurisdiction of the legislative body, subject to exceptions stated therein.

B. Closed Session Activities (1-4)²

For the Controller's Office to allow reimbursement for any "actual time" costs claimed by the county, those costs must come within the scope of the mandate. Santa Clara County has not demonstrated that "keyboard" was the only option available, or even the least expensive option available to comply with the requirements of the Open Meetings Act/Brown Act Reform.

2. "Actual Time" Recovery of Asset and Services Costs as Contained in Parameters and Guidelines

Under the "Actual Time" provision of the Parameters and Guidelines, the county must perform the following:

List the meeting names and dates. Show the names of the employees involved, the classification of the employees, mandated functions performed, actual number of hours devoted to each function, and productive hourly rates and benefits.³

Services, Equipment and Supplies

Only expenditures that can be identified as a direct cost as a result of the mandate can be claimed. List cost of materials or equipment acquired which have been consumed or expended specifically for the purpose of this mandate.

Fixed Assets

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities.⁴

² Closed Session activities were not specifically addressed in the November 18, 2002 memorandum.

³ Parameters and Guidelines Amendment, as Modified By Staff, Government Code Section 54954.2 Chapter 641, Statutes of 1986 Open Meetings Act, adopted November 30, 2000, effective December 1, 2000.

⁴ Parameters and Guidelines, Government Code Sections 54952, 54954.2, 54954.3, 54957.1 and 54957.7, adopted April 25, 2002.

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Your letter of June 16, 2003 references the Commission on State Mandate's response to Santa Clara County's 2003 requested amendment to provide that fixed assets include "all costs for upgrades of data processing equipment, software and technical services should be reimbursed." The Commission's response did not provide that all such costs were reimbursable, merely that "reimbursement for data processing software and service costs to implement the mandated activities ... can be claimed in other cost elements, such as materials and supplies, contracted services, or under fixed assets. Therefore, the County of Santa Clara's request to include reimbursement was previously addressed."

While these types of costs may in some instances be reimbursable, they must come within the scope of the mandate itself. The development of "keyboard" was at the discretion of the County; the mandate itself does not require such software be developed to comply with the Open Meetings Act. Nor does the language cited in your letter support that the Commission on State Mandates finds the circumstances involved in the development of "keyboard" to be reimbursable. Your letter appears to suggest that under "actual time" cost provisions, all software development would be reimbursable, without consideration of whether or not it was an increased cost the County was required to incur to comply with the mandate. While we understand that Santa Clara County's position is that it would not have incurred the costs associated with the development of "keyboard" had it not been for the mandate, our office is given the discretion to audit claimed costs and make any reasonable adjustments.⁵ If the costs associated with the development of "keyboard" were not required to be incurred, but were instead discretionary, such costs are not reimbursable.

While *City of Merced v. State of California* (1984) 153 Cal. App. 3d 777 is not exactly on point, as that case did not involve a particular mandate, the court did acknowledge that additional expenditures, which were not necessary to comply with a mandate, were discretionary costs and were not reimbursable. *Merced* is instructive here in that the County of Santa Clara has elected to develop the "keyboard" software to prepare and update meeting agendas, without substantiating that "keyboard" was necessary to comply with the mandate. The development of "keyboard" system, versus the utilization of widely available word processing software, or some other method, was at the discretion of Santa Clara County. The Open Meetings Act/Brown Act reform does not require a county to develop agenda preparation software; it requires the preparation and posting of an agenda as outlined in the Parameters and Guidelines.

⁵ California Government Code section 17561.

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The development of "keyboard" is a very individualized endeavor undertaken by Santa Clara County. My November 18, 2002 memorandum considered legislative committee notes and found no reference that the Legislature anticipated such costs as Santa Clara is now claiming, to comply with the applicable mandate. Further, the Legislature anticipated costs of approximately \$2-3.5 million annually.⁶ This anticipated cost is for 58 counties on an annual basis, compared to the over \$1 million in costs claimed by Santa Clara County alone for FY 1999-2000, and over \$2 million for FY 2000-2001.

In reviewing Santa Clara County's claim for reimbursement under the Open Meetings Act II/Open Meetings Brown Act Reform for FY 1998-99, 1999-00, 2000-01, our office wanted to compare the costs claimed by other counties to determine whether Santa Clara's costs were somewhat similar. Our evaluation revealed that Santa Clara County's claimed costs far exceed those claimed by other counties of similar population and/or geographic size. Several other counties (of at least 1.7 million people) submitted reimbursement claims for actual time under the Open Meetings Act for FY 1998-1999, 1999-2000, 2000-2001⁷ as follows:

County	FY 1998-99	FY 1999-2000	FY 2000-01
Alameda County	\$143,193	\$98,636	\$81,240
Los Angeles County	\$136,136	\$234,071	\$233,993
Monterey County	\$276,266	\$138,727	\$143,534
San Bernardino County	\$112,771	\$95,515	\$82,379
San Luis Obispo County	\$124,194	\$113,545	\$83,802
 Santa Clara County (Actual time only)	 \$550,914	 \$1,187,679	 \$2,888,835

While we acknowledge that each county may have specific needs or particular challenges in complying with the mandate, the requirements under the mandate are the same for all, suggesting that claimed costs would be fairly comparable throughout the state. Further, it would be expected that counties of like size would have very similar costs.

⁶ Stats. 1993, c. 1137 (SB 36) and Stats. 1993, c. 1136 (AB1426).

⁷ Such claims for reimbursement are the total combined claims under Open Meetings II and/or Open Meetings/Brown Act Reform.

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Conclusion

The County has not demonstrated that the costs associated with the development of "keyboard" are costs the county was required to incur to comply with the mandate. The Controller's Office's prior memorandum specifically addressed the costs claimed by the County for the development of the "keyboard" program and found them to be discretionary costs, beyond the scope of the mandate as defined in the Parameters and Guidelines. Any "actual time" costs, be they for services, equipment, supplies or fixed assets, must still come within the scope of the mandate itself. It is the opinion of the Controller's Office that the costs associated with the development of "keyboard" are not costs the County was required to incur to comply with the mandate, thus, those costs are not reimbursable. As such, we do not anticipate a change in our audit findings.

Sincerely,



CAROL L. NOREEN
Staff Counsel

CLN/ac

cc: Ann Miller Ravel, Santa Clara County Counsel
Richard Chivaro, Chief Counsel, Office of the State Controller
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